

**UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT**

Little River Band of Ottawa	)	
Indians Tribal Government,	)	
	)	
Petitioner/Cross-Respondent	)	Nos. 13-1464 and 13-1583
	)	
v.	)	
	)	
National Labor Relations Board,	)	
	)	
Respondent/Cross-Petitioner	)	

**RESPONSE OF THE LITTLE RIVER BAND OF OTTAWA INDIANS  
TRIBAL GOVERNMENT TO MOTION OF THE NATIONAL LABOR  
RELATIONS BOARD TO STAY ORAL ARGUMENT**

The Little River Band of Ottawa Indians Tribal Government (the “Band” or “Tribe”) hereby opposes the motion of the National Labor Relations Board (the “NLRB” or the “Board”) to stay oral argument on October 8, 2013 for the reasons set forth herein:

1. This case involves (a) a Petition by a federally recognized Indian Tribal Government facing an NLRB order, which seeks to strike down the Tribe’s operational laws governing labor relations within its reservation, and (b) a Cross-Petition for Enforcement of that order by the NLRB.

2. The underlying controversy has been pending since March, 2008, commencing with an NLRB Charge against the Band, dated March 28, 2008 and

then a formal NLRB Complaint against the Band, dated December 10, 2010. *See Motion of Petitioner, The Little River Band of Ottawa Indians Tribal Government, To Expedite Case*, filed May 9, 2013 (“*Motion to Expedite*”). *See also* Appendix (“App.”) at 23-27.

3. The Board issued its Decision and Order under review on March 13, 2013, the Band filed its Petition for Review on April 15, 2013, and the Board filed its Cross-Petition for Enforcement on April 30, 2013. App. at 12-20.

4. The Band filed a motion to expedite the case, including oral argument, on May 9, 2013, which the Court granted by expediting briefing and oral argument. *See Order* entered May 21, 2013 (granting *Motion to Expedite* and setting briefing schedule); *Order* entered May 30, 2013 (modifying briefing schedule on request for reconsideration by the Board).

5. By Notice dated August 20, 2013, the Court scheduled oral argument for October 8, 2013. *See Notice of Oral Argument at 9:00 am October 8, 2013*, filed August 20, 2013.

6. The Band objects to the Board’s motion to stay oral argument for the reasons spelled out in its May 9, 2013 *Motion to Expedite* and incorporates that Motion by reference herein.

7. This Court has announced that oral arguments will proceed as scheduled for the current session through October 11, 2013.<sup>1</sup>

8. The oral argument in this case, set for October 8, 2013, has been scheduled for over four months, and the current situation certainly was not unforeseeable.

9. The NLRB cites 31 U.S.C. § 1342 as grounds for its position that it cannot provide counsel to appear for oral argument next week. *See Motion of the National Labor Relations Board for a Stay in Light of United States Government Cessation* at 2.<sup>2</sup>

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<sup>1</sup> The Notice on the Court's website provides:

In the event of a federal government shutdown on October 1, 2013, the United States Court of Appeals for the Sixth Circuit will remain open. All oral arguments from October 1 through October 11, 2013, will be heard as scheduled. The CM/ECF system remains in operation for the filing of all documents, and all filing deadlines remain in effect.

<http://www.ca6.uscourts.gov/internet/default.html>.

<sup>2</sup> Section 1342 provides as follows:

An officer or employee of the United States Government or of the District of Columbia government may not accept voluntary services for either government or employ personal services exceeding that *authorized by law* except for emergencies involving the safety of human life or the protection of property. This section does not apply to a corporation getting amounts to make loans (except paid in capital amounts) without legal liability of the United States Government. As used in this section, the term "emergencies involving the safety of human life or the protection of property" does not include ongoing, regular functions of government the suspension of which would not imminently threaten the safety of human life or the protection of property.

31 U.S.C. § 1342 (emphasis added).

10. That statute is no impediment to the federal government's provision of counsel for oral argument. In fact, the Department of Justice takes the position that if a motion to stay like the instant motion of the Board is denied, it will make a lawyer available on the ground that the Court's Order would, tracking the language of the statute, "constitute express legal authorization for the activity to continue." *See Motion for a Stay of Litigation in Light of Lapse of Appropriations* (filed in *United States v. US Airways Group, Inc.*, No. 1:13-cv-01236-CKK (D.D.C.)) (attached hereto as Exhibit A) ¶ 2 at 2.<sup>3</sup>

11. In a setting similar to that presented here – where the federal government seeks to prosecute a civil matter and the Court had previously granted expedition of the case – the U.S. District Court for the District of Columbia today denied a motion for stay. *See Order, United States v. US Airways Group, Inc.*, No. 1:13-cv-01236-CKK (D.D.C.) (attached hereto as Exhibit B).

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<sup>3</sup> The Board's *Contingency Plan for Shutdown in the Absence of Appropriations Updated: September 27, 2013* ("NLRB Plan") apparently contemplates dealing with similar orders denying stays of its prosecution efforts in the same manner as the Justice Department. The NLRB Plan provides

the Acting General Counsel with required flexibility to . . . protect Federal legal actions already taken (but not pursue new cases) . . . and to deal with events that might occur during a shutdown. Here are the main points of the plan: . . .

- To protect Federal legal actions already taken, the Acting General Counsel will work with each Division/Office/Regional Director to designate NLRB personnel to deal with emergency situations that cannot be delayed during the shutdown period. Those personnel will be called into work and travel as necessary.

*See* NLRB Plan at 3, available at <http://mynlrb.nlr.gov/>.

12. The NLRB should similarly be required to comply with the Court's Order granting the Band's *Motion to Expedite* and the Court's related Order setting oral argument for October 8, 2013.

For these reasons, the Band respectfully asks that the Court deny the Board's motion and hear oral argument on October 8, 2013 as scheduled.

Dated: October 1, 2013

/s/ Kaighn Smith, Jr.  
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Counsel for the Petitioner

### CERTIFICATE OF SERVICE

I hereby certify that on October 1, 2013, I served the above response with attached Exhibits A and B, upon the Respondent/Cross-Petitioner, National Labor Relations Board, through counsel, who have entered appearances in this matter, by means of the Court's ECF system as follows:

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Dated: October 1, 2013

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## **Exhibit A**

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

UNITED STATES OF AMERICA, *et al.*

*Plaintiffs,*

v.

Civil Action No. 1:13-cv-01236-CKK

US AIRWAYS GROUP, INC.

and

AMR CORPORATION,

*Defendants.*

**MOTION FOR A STAY OF LITIGATION  
IN LIGHT OF LAPSE OF APPROPRIATIONS**

The United States of America hereby moves for a stay of the proceedings in the above-captioned case.

1. At the end of the day on September 30, 2013, the appropriations act that had been funding the Department of Justice expired and appropriations to the Department lapsed. The Department does not know when funding will be restored by Congress.

2. Absent an appropriation, Department of Justice attorneys and employees are generally prohibited from working, even on a voluntary basis, except in very limited circumstances, including “emergencies involving the safety of human life or the protection of property.” 31 U.S.C. § 1342. This is creating difficulties for the Department to perform the functions necessary to support its litigation efforts and, accordingly, the Department’s policy is to seek a stay in all pending civil litigation.

3. Undersigned counsel therefore respectfully requests a stay of all proceedings in this case until Congress has restored appropriations to the Department. If this motion for a stay is granted,



undersigned counsel will notify the Court as soon as Congress has appropriated funds for the Department. The United States requests that, at that point, all current deadlines for the parties be extended day-for-day with the duration of the lapse in appropriations. If the Court denies the request, the government will comply with the Court's order, which would constitute express legal authorization for the activity to continue.

4. Counsel for the United States has consulted with counsel for Defendants, who advise that they object to this motion.

Therefore, although we greatly regret any disruption caused to the Court and the other litigants, the United States hereby moves for a stay of all proceedings in this case until funding is restored and Department of Justice attorneys are permitted to resume their usual civil litigation functions.

Counsel for the United States will attend today's status conference.

Respectfully submitted,

/s/ \_\_\_\_\_  
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*Attorneys for Plaintiff United States*

Dated: October 1, 2013

## **Exhibit B**

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

UNITED STATES OF AMERICA, *et al.*

Plaintiffs,

v.

US AIRWAYS GROUP, INC., *et al.*,

Defendants.

**Civil Action No. 13-cv-1236 (CKK)**

**ORDER**

(October 1, 2013)

Currently before the Court is Plaintiff the United States of America's [92] Motion for a Stay of Litigation in Light of Lapse of Appropriations. Plaintiff has requested a stay due to the lapse of appropriations to the Department of Justice, stating that absent an appropriation, Department of Justice attorneys and employees are generally prohibited from working, except in very limited circumstances, including "emergencies involving the safety of human life or the protection of property." 31 U.S.C. § 1342. Defendants have opposed Plaintiff's motion for a stay.

The Court concludes that a stay would be inappropriate here for a number of reasons. This case involves a pending merger agreement between two major airlines, with a deadline for completion of January 18, 2014. The closing of this merger has been delayed by the affirmative actions of Plaintiffs in filing this case and seeking injunctive relief to block the merger. In light of these considerations, and the amount of money at stake in this merger, this case is clearly significant for both sides. Furthermore, the resolution of Defendant American Airline's pending bankruptcy proceedings hinges on the proceedings in this case. In addition, various amici –

particularly employees of the Defendants – have a vested interest in the adjudication of this case without delay. Indeed, because of the need for the prompt resolution of this matter, the Court has set an expedited discovery and trial schedule. A stay at this point would undermine this schedule and delay the necessary speedy disposition of this matter. It is essential that the Department of Justice attorneys continue to litigate this case.

Accordingly, for the reasons set forth above, it is, this 1st day of October, 2013, hereby

**ORDERED** that Plaintiff the United States of America's [92] Motion for a Stay of Litigation in Light of Lapse of Appropriations is **DENIED**.

**SO ORDERED.**

/s/  
**COLLEEN KOLLAR-KOTELLY**  
UNITED STATES DISTRICT JUDGE